(2)

Supreme Court, U.S.
FILED
MAR 14 1997
CLERK

No. 96-1270

In the Supreme Court of the United States

OCTOBER TERM, 1996

TEI FU CHEN AND SUNRIDER CORPORATION,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

12 pp

QUESTION PRESENTED

Whether petitioners are entitled to any relief because of the government's submission of attorney-client communications to the district court for a determination of the applicability of the crime-fraud exception to the attorney-client privilege before that court had the opportunity to consider whether the government's factual basis for assertion of the crime-fraud exception sufficed to justify *in camera* review of the communications.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

United States v. *Hasting*, 461 U.S. 499 (1983)	9
United States v. *Horn*, 29 F.3d 754 (1st Cir. 1994)	9
United States v. *Levy*, 577 F.2d 200 (3d Cir. 1978)	9
United States v. *Reynolds*, 345 U.S. 1 (1953)	8
United States v. *Zolin*, 491 U.S. 554 (1989)	5, 7, 8, 9

Constitution and statutes:

U.S. Const. Amend. V	6
18 U.S.C. 371	2
18 U.S.C. 545	2
18 U.S.C. 1001	2
19 U.S.C. 1592(c)(4)	2
26 U.S.C. 7201	2
26 U.S.C. 7206	2

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1270

TEI FU CHEN AND SUNRIDER CORPORATION,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 99 F.3d 1495.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1996. The petition for rehearing was denied on December 20, 1996. Pet. App. 21a. The petition for a writ of certiorari was filed on February 11, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 1, 1995, a grand jury sitting in the United States District Court for the Southern District of California returned an indictment charging petitioners with one count of conspiracy, in violation of 18 U.S.C. 371, and nine counts of tax evasion and filing false tax returns, in violation of 26 U.S.C. 7201 and 26 U.S.C. 7206. In addition, petitioner Chen was charged with nine counts of importing antiques by use of false statements, in violation of 18 U.S.C. 545. Pet. 2. A superseding indictment charged Chen with four additional counts under 18 U.S.C. 545 and with six counts of submitting false statements to the United States Customs Service, in violation of 18 U.S.C. 1001. Pet. 2 n.1.

Petitioner Chen and his wife own Sunrider Corporation and operate TF Chen Products, Inc., a subsidiary of Sunrider. The companies manufacture health food and skin care products and import their inventory from Taiwan, Hong Kong, Japan, and other countries. The importation tariffs the companies pay depend on the amount they declare as their purchase price of the goods. Undervaluation may result in administrative, civil, and criminal penalties. Pet. App. 2a. A statutory procedure allows an importer to mitigate or avoid penalties by filing a disclosure statement before the Customs Service learns of the undervaluation independently. See 19 U.S.C. 1592(c)(4).

The indictment alleged that the Chens imported their inventory and paid tariffs based on the true invoiced price, after which Chen's sister, Jau Hwa, the comptroller of Sunrider, would prepare entirely fictional invoices indicating much higher prices for

the imported goods. These fake invoices were given to Sunrider's accountants to prepare trial balances, which were used by Sunrider's tax preparers in calculating the company's income taxes. Under such a scheme, tariffs would be paid based on the true price of the corporation's imported inventory, while income taxes would be paid as though the goods had cost much more, thus substantially reducing Sunrider's taxable income. It is alleged that Chen periodically instructed Jau Hwa to wire the purported additional charges for inventory to bank accounts in Hong Kong, from which the Chens eventually recovered the funds, in order to maintain the fiction that Sunrider's payments were based on the overstated invoices. The government alleges that the Chens skimmed almost $90 million in this way. Pet. App. 2a-3a.

According to the indictment, the Chens eventually became concerned that their scheme would be discovered. To protect themselves, they instructed their attorneys, Stein, Shostak, Shostak & O'Hara, to file a disclosure with Customs representing that the cost of the imported goods had been understated. The disclosure stated that the true cost of the goods was reflected in the income tax returns filed at the Chens' direction. Assuming that the original Customs declarations were correct, the subsequent disclosure was a fraud intended to shield the Chens' tax evasion scheme. That scheme was discovered when Jau Hwa left Sunrider and turned over to the government materials she had taken from Sunrider's files, as well as her account of events on which the indictment is based. Pet. App. 3a-4a.

2. After the grand jury returned the initial indictment, it subpoenaed Joseph P. Cox, an attorney who had worked on the Sunrider matter for the Stein,

Shostak firm, and James D. Wilets, in-house counsel for Sunrider. Petitioners moved to quash the subpoenas, invoking their attorney-client privilege. The government cross-moved for an order allowing the subpoenas, arguing that Sunrider's communications to the lawyers were unprotected by the privilege because they had been made in furtherance of the fraudulent scheme. In support of its cross-motion, the government submitted affidavits from Jau Hwa and the Customs agent to whom she disclosed the scheme. These affidavits revealed Sunrider's communications with its lawyers. In response, petitioners filed declarations stating that Jau Hwa had stolen documents from Sunrider, including privileged correspondence between Sunrider's general and outside counsels, and had turned those documents over to the government. In addition, attorney Marjorie Shostak filed a declaration stating that neither she nor her firm had knowledge of any fraud committed by petitioners. Pet. App. 4a-5a.

The district court found that the government had failed to make a prima facie case that the attorneys in any way participated in the alleged conspiracy. The court stated that, in ruling on the motion to quash and the applicability of the privilege, it was disregarding privileged information divulged by Jau Hwa as disclosed in the affidavits. Nevertheless, the court denied the motion to quash. It concluded that petitioners had used their lawyers to make false statements to the Customs Service, albeit not with the lawyers' knowledge. Accordingly, under the crime-fraud exception to the attorney-client privilege, petitioners' communications with their attorneys were not protected and could be disclosed to the grand jury. Pet. App. 6a.

3. On appeal, petitioners contended that the district court should have quashed the subpoenas ordering their attorneys to testify before the grand jury on the ground that the attorneys' testimony was protected by the attorney-client privilege. The court of appeals began by holding that petitioners' communications with their lawyers concerning the filing of the disclosure statement were attorney-client communications for purposes of the privilege, since "the attorneys were employed for their legal knowledge, to bring their clients into compliance with the law." Pet. App. 12a-13a. The court agreed with petitioners that Jau Hwa lacked authority to waive petitioners' attorney-client privilege, and, therefore, that her disclosures of attorney-client communications to the government did not foreclose petitioners' invocation of the privilege. *Id.* at 13a.

The court of appeals also agreed with petitioners that the government improperly submitted the affidavits of Jau Hwa and the Customs agent, thereby disclosing attorney-client communications to the district court before the court had decided that such disclosure should be made. Pet. App. 13a. The court of appeals explained that, in order to establish the applicability of the crime-fraud exception, the government was required, before disclosing the communications to the court, to make a factual showing supporting "a good-faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the * * * exception applies." *Id.* at 14a (quoting *United States* v. *Zolin*, 491 U.S. 554, 572 (1989)). The court determined, however, that the government's error in prematurely disclosing the attorney-client communications to the district court was harmless because the district

court recognized the error and stated that, in deciding whether the crime-fraud exception applied, it would disregard the privileged information disclosed by Jau Hwa. Pet. App. 15a.

Finally, the court of appeals agreed with the district court that the crime-fraud exception barred the assertion of the attorney-client privilege. The court explained that even without the improperly submitted disclosures of attorney-client communications, there was "reasonable cause to believe that the [petitioners] were using their lawyers to help prepare the paperwork for th[eir] fraudulent scheme." Pet. App. 16a. The court held that the lack of any guilty knowledge on the part of the attorneys was irrelevant because "the privilege was the client's, and the client's misconduct sufficed to lose it." *Id.* at 17a. Accordingly, the court upheld the denial of petitioners' motion to quash the grand jury subpoenas.

4. Following the court of appeals' affirmance of the district court's denial of the motion to quash, attorney Wilets testified before the grand jury. Attorney Cox invoked his Fifth Amendment privilege and did not testify. Thereafter, the grand jury returned the superseding indictment against petitioners. The term of the grand jury has since expired. See Pet. App. 18a.

ARGUMENT

Petitioners no longer contend that the crime-fraud exception is inapplicable in this case or that the subpoenas directing their attorneys to appear before the grand jury violated their attorney-client privilege. Rather, their sole contention is that they are entitled to relief because the government improperly disclosed attorney-client communications to the

district court before the court determined that *in camera* review of the communications might establish the applicability of the crime-fraud exception.

As an initial matter, petitioners do not specify the relief to which they believe they are entitled. The only relief they have sought in the courts below based on violation of their attorney-client privilege is the quashing of the subpoenas to their attorneys. Since both attorneys have appeared before the grand jury, the grand jury has returned a superseding indictment against petitioners, and the term of the grand jury has expired, it is too late to quash the subpoenas. Any other relief petitioners seek should first be requested from the courts below.

In any event, petitioners' claim fails on the merits. In *United States* v. *Zolin*, 491 U.S. 554, 572 (1989), the Court held that, before a district court may engage in *in camera* review of attorney-client communications at the request of the party invoking the crime-fraud exception, that party must submit evidence sufficient to support a reasonable belief that such review may reveal evidence establishing the exception's applicability. Here, as petitioners point out, the government improperly submitted attorney-client communications to the district court before the court determined that *in camera* review was justified. The court of appeals agreed with petitioners that the government's submission of attorney-client communications was erroneous under *Zolin*. Nevertheless, the court concluded that the error was harmless. That conclusion was correct and does not warrant the Court's review.

The government's premature disclosure of attorney-client communications did not prejudice petitioners. First, the district court recognized that the government's submission was erroneous and ex-

pressly stated on the record that, in deciding the applicability of the crime-fraud exception, it would disregard Jau Hwa's statements regarding privileged information. Pet. App. 15a. Accordingly, the improper disclosures did not affect the court's determination that the exception applied. Likewise, in upholding the district court's application of the crime-fraud exception, the court of appeals disregarded the improper submission of attorney-client communications.

Further, the requirement that the party seeking *in camera* review make a threshold showing that review is appropriate rests on the recognition that "'examination of the evidence, even by the judge alone, in chambers' might in some cases 'jeopardize the security which the privilege is meant to protect.'" *Zolin*, 491 U.S. at 570 (quoting *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953)). In light of the ultimate determination of the district court, upheld by the court of appeals, that the privilege did not extend to the attorney-client communications at issue, the government's premature disclosure of the those communications to the court could not have jeopardized any interest that the privilege was designed to protect.

In short, because the government's erroneous disclosure of attorney-client communications neither contributed to the judicial determination that the communications were unprotected by the privilege nor undermined any interest protected by the privilege, the disclosure was harmless. And given the harmlessness of the erroneous disclosure, petitioners are not entitled to a remedy simply to sanction the

government. See *United States* v. *Hasting*, 461 U.S. 499 (1983).*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

MARCH 1997

---

* Petitioners' reliance (Pet. 5-6) on *United States* v. *Horn*, 29 F.3d 754 (1st Cir. 1994), and *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978), is misplaced. As is apparent from petitioners' description of the cases, neither case involved premature disclosure of attorney-client communications by the government in violation of the procedure set forth in *Zolin*, and neither case involved disclosures that were found to be harmless.